IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 10, 2008 Session

JOHN M. MURRAY, JR. v. TENNESSEE FARMERS ASSURANCE COMPANY

Appeal from the Circuit Court for Davidson County
No. 06C3046 Amanda McClendon, Judge

No. M2008-00115-COA-R3-CV - Filed August 12, 2008

Insured filed suit to enforce a claim settlement allegedly created by an exchange of letters between the insurance company and insured's attorney. The trial court granted summary judgment for the insurance company, holding that there was no meeting of the minds and therefore no contract of settlement. Insured appeals. We affirm the circuit court and find this appeal to be frivolous.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed and Remanded

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Henry S. Queener, Nashville, Tennessee, for the appellant, John M. Murray, Jr.

Brenda M. Dowdle, Nashville, Tennessee, for the appellee, Tennessee Farmers Assurance Company.

OPINION

On November 28, 2005, Amanda and John Murray were involved in an automobile accident caused by an uninsured driver. Mrs. Murray, who was pregnant at the time, was transported to an emergency room for treatment. Mr. Murray made no request for treatment and, in fact, told the emergency room physician that he was not injured.

Mr. Murray reported the accident to Tennessee Farmers Mutual Insurance Company the day after the accident. He did not report that he had been injured. On November 30, 2005, he was contacted by Senior Claims Representative Douglas Allen. Again, Mr. Murray did not report any injuries to himself. The insurance company settled with Mr. Murray for payment of the property damage under his collision coverage in December 2005.

The Murrays sent medical bills for Amanda Murray's treatment for her auto accident injuries to the insurance company in July 2006. No medical bills were sent to the insurance company on behalf of John Murray because he had not received any treatment for an injury at that time. Mr. Allen expressed his intention to Amanda Murray's mother to offer the policy limits of $25,000 to Mrs. Murray for her injuries.

Later in July 2006, the Murrays hired attorney Henry Queener to represent them. On July 26, 2006, Mr. Queener sent Mr. Allen a sharply-worded letter which essentially alleged a lack of diligent action on Mr. Allen's part and the denial of Mr. Murray's claim. The letter demanded payment of the policy limits of $25,000 for each of the Murrays, a total of $50,000, within ten days and attached $34,208.55 in medical bills for Amanda Murray's treatment.

Mr. Allen responded in a letter dated July 27, 2006. He took exception to Mr. Queener's allegations. Mr. Allen then made the statement that formed the basis of this action: "We have offered to settle with the Murrays under the Uninsured Motorist Bodily Injury provision in their policy for the limits of coverage of $25,000.00 per person."

In a letter dated August 1, 2006, Mr. Queener pounced on the above-quoted sentence in Mr. Allen's letter, writing, "Your offer to settle with the Murrays for the limits of coverage of $25,000 is hereby accepted. Please send a release and check for $50,000 made payable to me, John Murray and Amanda Murray." The next day, a lawyer for the insurance company responded to Mr. Queener's alleged acceptance with the following:

> In your letter of August 1, 2006 you tried to accept a settlement offer of $50,000.00, but in fact no $50,000.00 offer was ever made. According to Mr. Allen, the only bodily injury claim pending, and the only medical records and bills in Mr. Allen's possession, relate to Amanda Murray. As you know, the limit of liability for each person is $25,000.00. That is all Mr. Allen tried to convey to you in his letter of July 27, 2006. For that reason, Mr. Allen at this time can only send you a check for $25,000.00, representing a settlement for Amanda Murray.
>
> If you wish to pursue a claim for John M. Murray, Jr., you are free to do so and it will be considered when you provide medical records and bills and anything else you wish to submit as their attorney. I'm sure you realize that Mr. Allen cannot pay limits coverage for any claimant with no support whatsoever for that claim. I'm not saying you have no support; but I am saying that Mr. Allen doesn't have it and he needs it before he can pay anything for John Murray.

Mrs. Murray's claim was subsequently settled. Neither the Murrays nor Mr. Queener on their behalf submitted any medical bills as to Mr. Murray. Mr. Murray first visited a doctor about his knee on November 3, 2006.

Mr. Queener filed suit against the insurance company on Mr. Murray's behalf on November 20, 2006, alleging that the company breached a contract of settlement formed by the "offer" in the letter from Douglas Allen of July 27, 2006, and the "acceptance" in the response from Mr. Queener dated August 1, 2006. After the answer was filed, the Murrays moved for judgment on the pleadings, which was denied. The insurance company filed a motion for summary judgment which was granted on January 2, 2008. The trial court found "that there was no meeting of the minds sufficient to form a contract for the settlement of the Plaintiff's bodily injuries for the amount of $25,000." Mr. Murray appealed.

Standard of Review

Pursuant to Tenn. R. Civ. P. 56.04, summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. There is no disagreement as to the material facts in this case. The main issue is whether a contract was formed by the correspondence between Mr. Allen and Mr. Queener. Questions of contract formation are questions of law. *In re Estate of Nelson*, No. W2006-00030-COA- R3-CV, 2007 WL 851265, *7 (Tenn. Ct. App. Mar. 22, 2007) (no Tenn. R. App. P. 11 application filed); *Petersen v. Genesis Learning Ctrs.*, No. M2004-01503-COA-R3-CV, 2005 WL 3416303, *4 (Tenn. Ct. App. Dec. 13, 2005) (no Tenn. R. App. P. 11 application filed). Questions of law are subject to de novo review with no deference to the trial court's decision. *Petersen*, 2005 WL 3416303, at *4.

Analysis

A settlement agreement is a contract. *Sweeten v. Trade Envelopes, Inc*., 938 S.W.2d 383, 385 (Tenn. 1996). To be enforceable, the contract must be the result of the parties' meeting of the minds. *Id*. at 386. There is no enforceable contract without mutual assent to the terms. *Id*. To determine mutual assent, the intention of the parties must be examined. *Petersen*, 2005 WL 3416303, at *4. The search for the parties' intent begins with the writing itself but includes the circumstances surrounding the alleged creation of the contract. *Id*.; *Realty Shop, Inc. v. RR Westminster Holding, Inc.*, 7 S.W.3d 581, 597 (Tenn. Ct. App. 1999).

In reviewing the grant of summary judgment, we must examine the evidence and all reasonable inferences in the light most favorable to the non-moving party, Mr. Murray. *Doe v. HCA Health Servs. Inc*., 46 S.W.3d 191, 196 (Tenn. 2001). That light, however, does not illuminate very much in Mr. Murray's favor. Mr. Murray maintains that the following language from Mr. Allen's July 27, 2006 letter constituted an offer of settlement of $25,000 to his wife and another $25,000 to him: "We have offered to settle with the Murrays under the Uninsured Motorist Bodily Injury provision in their policy for the limits of coverage of $25,000.00 per person." Mr. Murray argues that "it is at least possible the letters evidence a meeting of the minds sufficient to withstand summary judgment."

The language at issue is in the past tense. On its face, the language appears to be reciting events of the past. Indeed, the July 27 letter as a whole clearly reflects that the sentence in question

is written in the context of Mr. Allen defending himself against the allegations of lack of effort made in Mr. Queener's prior letter. The remainder of the letter further undercuts the argument that an offer was made. At the beginning of the next paragraph, Mr. Allen wrote: "There is another issue that must be addressed prior to the settling of this claim." That issue involved the right of TennCare to reimbursement. The letter concludes, "Once you have had the opportunity to review the above, and when you are ready to bring this matter to a close, then contact me and I will be glad to assist in settling our insureds claim, promptly and fairly!" Obviously, Mr. Allen did not view the controverted language as an offer that would settle the matter.

The circumstances surrounding the letter do nothing to aid Mr. Murray's strained interpretation of the July 27, 2006 letter. Prior to the exchange of letters that Mr. Murray contends created a settlement contract, Mr. Murray never made a claim for injuries arising from the automobile accident. He had not gone to a doctor or even incurred a medical bill. It is not realistic to believe an insurance company would offer to pay $25,000 to an insured who had not claimed any injury until the day before the alleged offer and had not submitted any medical bills.

We conclude that the trial court was correct. There was no meeting of the minds and, therefore, no settlement contract for bodily injury regarding Mr. Murray.

Frivolous Appeal

"When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may. . . award just damages against the appellant, which may include but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal." Tenn. Code Ann. § 27-1-122. An appeal is considered frivolous when it appears the appellant has no reasonable chance of success. *Liberty Mut. Ins. Co. v. Taylor*, 590 S.W.2d 920, 922 (Tenn. 1979).

We are persuaded that Mr. Murray's appeal had no reasonable chance of success; therefore, it is frivolous, and in our opinion, Mr. Murray presented no persuasive argument or colorable claim of error on appeal - just a strained interpretation of one sentence of a letter taken out of context. No reasonable person would have considered this sentence an offer to settle Mr. Murray's "claim." He sought funds for which he admitted in his deposition no proof had been submitted to the insurance company. We, therefore, remand to the trial court for determination of appropriate damages consisting of Tennessee Farmers Assurance Company's reasonable and necessary attorney's fees and reasonable expenses incident to the appeal.

Costs of appeal are assessed against Mr. John Murray, for which execution may issue, if necessary.

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ANDY D. BENNETT, JUDGE